

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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IN RE: JOSEPH RIECK
 Respondent

Case No.: CR-B-05-800016

FINAL ORDER

I. INTRODUCTION

On or about June 22, 2005, the District of Columbia Board of Real Estate Appraisers (the “Board”) issued a Notice of Intent to Take Disciplinary Action (“Notice”) against Respondent Joseph Rieck. On June 24, 2005, the Board filed a copy of the Notice with this administrative court. On or about September 8, 2005, this matter was assigned to the undersigned Administrative Law Judge to conduct proceedings and issue a final decision pursuant to D.C. Code, 2001 Ed. § 2-1831.03(i).

The Notice charged Respondent with the following violations:

Charge I: Willfully making a false and misleading appraisal report in violation of D.C. Code, 2001 Ed. § 47-2853.17(a)(9); 17 District of Columbia Municipal Regulations (“DCMR”) § 2317.1, and the *Uniform Standards of Professional Appraisal Practice* for which the Board may take the proposed action pursuant to D.C. Code, 2001 Ed. § 47-2853.17(c).

- Charge II: Committing a substantial error of omission or commission that significantly affects an appraisal in violation of D.C. Code, 2001 Ed. § 47-2853.17(a)(19); 23 DCMR § 2317.1,¹ and the *Uniform Standards of Professional Appraisal Practice*, Standards Rule 1-1(b) (2000) for which the Board may take the proposed action pursuant to D.C. Code, 2001 Ed. § 47-2853.17(c).
- Charge III: Failing to analyze the comparable data to estimate the difference between cost, new and the present worth of improvements in violation of D.C. Code, 2001 Ed. § 47-2853.17(a)(19); 23 DCMR § 2317.1, and the *Uniform Standards of Professional Appraisal Practice*, Standard Rule 1-4(b)(iii)(2000) for which the Board may take the proposed action pursuant to D.C. Code, 2001 Ed. § 47-2853.17(c).

After preliminary proceedings, this administrative court issued a Prehearing Conference Order on November 22, 2005, scheduling an evidentiary hearing for January 18, 2006. At the January 18, 2006, hearing, Assistant Attorney General Khadijah Muhammad-Starling appeared as counsel for the Board. Wilfred A. Usher, Investigator with the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”)’s Office of Investigations and Weights and Measures, testified for DCRA. Daniel G. Bader, a residential real estate appraiser, qualified as an expert witness and also testified for DCRA. Respondent Joseph Rieck appeared and, after waiving his right to be represented by counsel, testified on his own behalf. During the hearing, DCRA Exhibits 100 through 107 were admitted into evidence.

¹ The citation to Title 23 DCMR was clearly in error, as that Title relates to the licensing of alcoholic beverages. DCRA’s citation to an incorrect regulation does not preclude proceeding against Respondent on these charges, as the District of Columbia Court of Appeals squarely addressed that issue in *F.W. Woolworth Co. v. D.C. Bd. of Appeals and Review*, 579 A.2d 713, 716 (D.C. 1990), where the Court of Appeals found that a citation error was harmless where a respondent had adequate notice of the essence of the charge and had prepared a defense. *See also Karriem v. Gray*, 623 A.2d 112, 113 (D.C. 1993) (holding that an error in citation was not material as the text of the notice sent to appellant explained the charges clearly).

Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

On or about September 10, 2000, First Priority Mortgage, a mortgage lender in Rockville, Maryland, engaged Respondent to appraise a property at 49 Hanover Place, N.W., Washington, DC (the “Property”) for a sales transaction to establish market value at the time. On September 10, 2000, Respondent appraised the Property and assigned an estimated market value of \$164,000. Petitioner’s Exhibit (“PX”) 103.

Respondent has been a licensed Residential Appraiser in the District of Columbia since March 25, 1999. PX 101.

Respondent’s appraisal report did not note that the subject Property, after being on the market for 606 days, sold for \$60,000 on August 17, 2000, less than a month prior to his appraisal. The report described the Property and its improvements as being in average condition with an effective age of 20 to 25 years. Respondent selected as the appropriate neighborhood properties that ranged in sale prices from a low of \$70,000 to a high of \$220,000, with the predominant sales price of \$150,000. In choosing properties to use as comparables in the appraisal report, Respondent selected renovated properties. The subject Property had not been renovated.

At some unknown time, the Federal National Mortgage Association (“Fannie Mae”), a congressionally chartered source of mortgage funds, acquired the mortgage on the Property. The

mortgage had been foreclosed. Thereafter, Fannie Mae performed a standard quality control examination on its loan for the Property, by obtaining a review appraisal of Respondent's appraisal.

On December 6, 2001, Fannie Mae contacted the Board, expressing concern that Respondent's appraisal might have violated various provisions of the *Uniform Standards of Professional Appraisal Practice* ("USPAP"). Fannie Mae requested that the Board conduct an investigation to determine if such violations had occurred. PX 100.

After checking and confirming with DCRA's Occupational and Professional Licensing Administration to determine that Respondent was a licensed residential appraiser in DC at the time Respondent conducted the appraisal of the Property, the matter was referred to DCRA's Office of Compliance and Enforcement² to conduct an investigation to determine if Respondent submitted a fraudulent appraisal. PX 102. As part of DCRA's investigation, Investigator Wilfred Usher reviewed the Summary Residential Appraisal Report prepared by Respondent in September 2000 (PX 103) and the Residential Appraisal Field Review Report prepared by Daniel G. Bader on August 28, 2001, for Fannie Mae (PX 104).

Mr. Bader conducted his review on August 2001 as a retrospective review – as though he was doing the appraisal in September 2000, when Respondent prepared his appraisal report. The sale prices for the appropriate neighborhood properties Mr. Bader selected ranged from a low of \$25,000 to a high of \$220,000, with the predominant sales price of \$60,000. Mr. Bader took into account the fact that the Property had sold on August 17, 2000, for \$60,000 after being on the

² DCRA's Office of Compliance and Enforcement subsequently became the Office of Investigations, Weights and Measures.

market for 606 days. The Property needed a total rehabilitation as it had not been renovated at all. It showed a significant amount of deferred maintenance, including rotted old windows and doors, water damaged flooring and walls and outdated appliances and fixtures, including a partially demolished kitchen. PX 107. Its effective age was between 55 and 60 years. The market value of the Property on September 20, 2000, when the appropriate adjustments were made for the condition of the property, was \$60,000.

After completing his investigation in July 2003, Investigator Usher recommended that the matter be referred to the Board for disciplinary action. PX 105.

III. CONCLUSIONS OF LAW

A. Charges

The Board asserts that disciplinary action is warranted against Respondent Rieck under D.C. Code, 2001 Ed. § 47-2853.17(c), based on three charges it brought: willfully making a false and misleading appraisal report; committing a substantial error of omission or commission that significantly affected the appraisal; and failing to analyze available comparable data to estimate the difference between cost, new and the present worth of improvements – in connection with an appraisal of the Property at 49 Hanover Place, N.W., on September 10, 2000. The Board contends that Respondent's conduct in connection with this appraisal violated D.C. Code, 2001 Ed. §§ 47-2853.17(a)(9) and (a)(19); 17 DCMR § 2317.1, and the *Uniform Standards of Professional Appraisal Practice*, 2000 edition, Standards Rule 1-1(b) (Charge II) and Standard Rule 1-4(b)(iii) (Charge III).³

³ Charge I mentioned the USPAP, but did not cite to a specific section of that document.

The statutory bases for the charges provide, in pertinent part, as follows:

**Title 47-2853.17. Revocation, suspension, or denial of license or privilege;
civil penalty; reprimand**

(a) Each board, subject to the right of a hearing as provided by this subchapter, on an affirmative vote of a majority of its members present and voting may take 1 or more of the disciplinary actions provided in subsection (c) of this section against any applicant or person permitted by this subchapter to practice an occupation or profession regulated by the board who:

(9) Willfully makes or files a false report or record in the practice of his or her occupation or profession, willfully fails to file or record any report required by law, impedes or obstructs the filing or recording of the report, or induces another to fail to file or record the report;

* * *

(19) Violates any District or federal law, regulation, or rule related to the practice of the occupation or profession;

(c) Upon determination by a board that an applicant, licensee, or person permitted by this subchapter to practice in the District has committed any of the acts described in subsection (a) of this section, the board may direct the Mayor to:

(1) Deny a license or certificate to an applicant;

(2) Revoke or suspend the license of any licensee or the certificate of a certified person, or may refuse to register a person;

(3) Revoke or suspend the privilege to practice in the District of any person permitted by this subchapter to practice in the District;

(4) Reprimand any licensee or person permitted by this subchapter to practice in the District;

(5) Impose a civil fine not to exceed \$ 5,000 for each violation by any applicant, licensee, or person permitted by this subchapter to practice in the District;

(6) Require a course of remediation, approved by the board, which may include:

(A) Therapy or treatment;

(B) Retraining; and

(C) Reexamination, in the discretion of and in the manner prescribed by the board, after the completion of the course of remediation;

- (7) Require a period of probation; or
- (8) Issue a cease and desist order pursuant § 47-2853.19 [repealed, see now § 47-2844.01].

The cited regulation, as written at the time of the alleged violation, provided as follows:

17-2317. Standards of Professional Practice.

2317.1 A licensee or certificate holder shall conduct all appraisals in conformity with the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Standards Board of the Appraisal Foundation.

The *Uniform Standards of Professional Appraisal Practice*, 2000 edition, Standards Rule

1-1(b) is a binding requirement of the USPAP Standards and provides as follows:

Standards Rule 1-1. In developing a real property appraisal, an appraiser must:

- (b) not commit a substantial error of omission or commission that significantly affects an appraisal;

The *Uniform Standards of Professional Appraisal Practice*, 2000 edition, Standards Rule

1-4(b)(iii) contains specific requirements from which departure is permitted and provides as follows:

Standards Rule 1-4. In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).

- (b) When a cost approach is applicable, an appraiser must:

- (iii) analyze such comparable data as are available to estimate the difference between cost new and the present worth of the improvements (accelerated depreciation).

The Board has authority to impose sanctions for these violations against licensed appraisers. D.C. Code, 2001 Ed. § 47-2853.04(a)(26). A “Real Estate Appraiser” is defined in the DC Code as follows:

Title 47-2853.151. Scope of practice for real estate appraisers.

For the purposes of this part, the term “real estate appraiser” means any person who renders or offers to render professional services to persons, groups, or organizations in the act or process of estimating the value of real estate.

Thus, as a Real Estate Appraiser licensed in the District of Columbia, Respondent is subject to being sanctioned if he committed the violations as alleged. Preliminarily, it is critical to discuss the differences between what provisions of the USPAP the Board charged Respondent with violating in the Notice of Intent to Take Disciplinary Action and the evidence presented at the hearing.

At the hearing in this case, Daniel G. Bader, DCRA’s expert witness, testified that Respondent violated USPAP sections different than those cited in the Notice. Mr. Bader cited to Standard Rule 1-5(b), a binding requirement which requires an appraiser to analyze any prior sales of the property being appraised that occurred within the prior year. In doing his field review in August of 2001, Mr. Bader located the August 2000 sale of the Property in the DC tax records. Mr. Usher noted in his July 2, 2003, report that the subject Property was listed in the Multiple Listing Service on December 7, 1998, received a contract on August 4, 2000, settled on August 17, 2000, and was recorded in the tax records on August 29, 2000.

In Specification B in support of Charges I and II, the Board noted that Respondent “failed to note that the subject property had been transferred within one month prior to its appraisal

date” and that “[t]he subject property listed on December 7, 1998 for \$70,000, reduced to \$68,300 and contracted for sale at \$60,000 and sold at that price August 17, 2000.”

On the basis that Respondent utilized the incorrect neighborhood criteria, when he used the price range of \$70,000 to \$220,000 with the predominant price of \$150,000, rather than the range Mr. Bader found to be appropriate, Mr. Bader also testified that he found Respondent’s appraisal report to be in violation of USPAP Standard 1-1(a) which provides a binding requirement that an appraiser “Be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal.”

Lastly, Mr. Bader testified that he found Respondent’s appraisal report to be in violation of USPAP Standard 2-1(a) which provides a binding requirement that “[e]ach written or oral real property appraisal report must: (a) clearly and accurately set forth the appraisal in a manner that will not be misleading” due to Respondent’s selection of neighborhood, comparables which were all renovated and subject Property description as average when it needed a complete rehabilitation.

In Specification B in support of Charges I and II, the Board noted that the reviewer’s report disputed Respondent’s comparables and the condition of the subject Property as Respondent’s appraisal report described the property as average with an effective age of 20 to 25 years, while Mr. Bader’s assessment was that the property was in poor condition needing a complete rehabilitation with an effective age of 55 to 60 years. In addition, Specification B noted that the area was in transition with the average price of \$95,686, a much lower low sales price and a predominant price of \$60,000 rather than the \$150,000 Respondent had utilized. Finally, Specification B noted that even if Respondent’s appraisal report had correctly described

the Property as average, all Respondent's comparables were renovated properties not in "average" condition.

In other regulatory arenas, it is settled law that an agency seeking to penalize a party for a statutory or regulatory violation must inform that party of the statute or regulation allegedly violated as well as the underlying facts that constitute the alleged violation. It has long been held that the Due Process Clause of the Fifth Amendment and statutory notices that charges are being brought must provide respondents with full and fair notice of any charges brought against them and a reasonable opportunity to prepare a defense. *See e.g., D.C. Code, 2001 Ed. § 2-1802.01; Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *In re Gault*, 387 U.S. 1, 33-34 (1967); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

A defect in a statutory or regulatory citation is not necessarily fatal to an agency's claim against an adverse party. An agency may proceed even in the face of a defective notice if the adverse party "was given adequate opportunity to prepare and present its position . . . and . . . no prejudice resulted from the originally deficient notice." *Watergate Improvement Assocs. v. Pub. Serv. Comm'n*, 326 A.2d 778, 786 (D.C. 1974). *See also Ridge v. Police & Firefighters Ret. & Relief Bd.*, 511 A.2d 418, 424 (D.C. 1986). The dispositive question is not whether a citation is technically correct but rather whether the procedure was fair. *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979). Fairness and due process require that the cited party have actual notice and a fair opportunity to litigate the charges. *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930-31 (7th Cir. 1986).

In the instant case, although the Notice did not list the additional USPAP Standards violations described by Mr. Bader in his testimony, I find that Respondent had sufficient notice

from the detailed specifications supporting the charges of the nature of the charges against him. Furthermore, the Board did not request sanctions for each charge or each statutory, regulatory or USPAP violation established, but rather is seeking a single set of sanctions for all violations established.

More significantly, Respondent testified that he could not defend the appraisal report or explain why he did what the Board has alleged, as he had absolutely no recollection of having conducted the September 10, 2000, appraisal of the Property. He noted that he no longer had any records from September 2000 when he was served with the Notice of Intent to Take Disciplinary Action in October 2005, as there is only a five year requirement to keep records and, in addition, some of his records were destroyed due to a roof leak in his storage area.

Respondent asserted at the hearing that he had recently returned to the same street to conduct another appraisal, that it is a unique street in that one has to pass through an alley to get there, and that he had no memory of ever being on that street before. Respondent did not dispute that it is his name and license number on the Summary Residential Appraisal Report. However, he contended that he learned in the military to always use his middle initial, and the signature on the Appraisal Report does not have an initial. Respondent admitted that he always did his own appraisals. While inferring at the hearing that he was investigating whether someone else could have signed the appraisal report, Respondent presented no concrete evidence that the signature on the Appraisal Report was not his.

Nevertheless, I find that the Board has failed to prove by a preponderance of the evidence that Respondent committed the first of the charges, which requires a “willful” making of a false and misleading appraisal report. While the Board established beyond any question that

Respondent's appraisal report was misleading, when it estimated the value of the subject Property at more than \$100,000 over current market conditions at the time, I cannot find that the Board established that Respondent's conduct met the definition of "willful" conduct.

In *Quality Mgmt., Inc. v. D. C. Rental Hous. Comm'n*, 505 A.2d 73, 75-76 (D.C. 1986), the District of Columbia Court of Appeals defined the terms, "knowingly," and "willful," in interpreting the rental housing laws. The court stated that the term, "knowingly," "imports only a knowledge of the essential facts ... and, from such knowledge of the essential facts, the law presumes knowledge of the legal consequences arising from performance of the prohibited conduct." *Id.* at 75. The Court held, however, that the term, "willful," is more restrictive in that it requires proof of a culpable mental state, *i.e.*, an intent to violate the law. *Id.* at 76, n.6. The Court of Appeals recently reconfirmed this definition of "willful" in *Parreco v. D. C. Rental Hous. Comm'n*, 885 A.2d 327, 337 n.15 (D.C. 2005). Nothing in the Board's presentation showed the culpable state of mind necessary to establish the required willfulness on Respondent's part in this case. The Board did not even allege, much less prove, that Respondent benefited from the erroneous appraisal. Nor did the Board present any other evidence that would provide a rationale or motive on Respondent's part to support a claim that Respondent's conduct was willful, and I am unable to ascertain any rationale or motive for Respondent to have intentionally falsified the appraisal report. Thus the charge of violating D.C. Code, 2001 Ed. § 47-2853.17(a)(9), 17 DCMR § 2317.1 and unspecified sections of the USPAP must be dismissed.

As to the second charge, the Board has proven by a preponderance of the evidence that Respondent, through a series of misstatements in his appraisal report, committed a substantial error of omission or commission that significantly affected the appraisal results. D.C. Code,

2001 Ed. § 47-2853.17(a)(19). Respondent's description of the Property as average when it clearly needed a complete rehabilitation to even be habitable, the failure to note that the property had been on the market for 20 months and has sold the previous month for \$60,000, more than \$100,000 less than Respondent's appraisal value and Respondent's use of comparables that had been completely renovated constitute substantial errors of omission or commission that significantly affected the appraisal results.

As to the third charge, Respondent violated statutory and regulatory duties and USPAP standards by issuing an appraisal that "inflated the value of the subject property [by over \$100,000] and did not reflect its true condition." Specification A in Notice of Intent to Take Disciplinary Action; D.C. Code, 2001 Ed. § 47-2853.17(a)(19); 17 DCMR § 2317.1, and USPAP Standard Rule 1-4(b)(iii). While neither Respondent's appraisal report nor Mr. Bader's Field Review Report provided the specifics of the neighborhood sales that made up the neighborhood portion of the reports, I credit Mr. Bader's testimony that he pulled the list of all sales in the year preceding the Respondent's appraisal, and that the range and predominant sales prices were significantly lower than that listed in Respondent's appraisal report. Mr. Bader testified that his analysis of the available comparable data resulted in a "present worth" of \$60,000 as opposed to Respondent's valuation of \$164,000. Respondent's lack of any recollection of this appraisal made him unable to challenge or refute the Board's evidence.

B. Sanction

At the conclusion of the hearing, the Board argued that Respondent's overvaluation of the Property should not be taken lightly, as it had financial consequences for the original lender, the borrower and for Fannie Mae, which received the property when it was foreclosed. Further, the Board contended that Respondent's valuation was not merely mistaken but an intentional misrepresentation of the Property's value. In addition, the Board asserted that the overvaluation caused the subsequent foreclosure, which affected the neighborhood and the citizens of the District of Columbia. The Board noted that it was seeking a one year suspension and a fine of \$2,500.

In mitigation, Respondent testified that he had only been licensed in the District of Columbia for 18 months at the time of the appraisal of the subject Property. Since that time, he has taken a number of courses including a seven-day home inspection course, a 15-hour class covering the USPAP standards and a seven-hour update on the USPAP standards. In addition, Respondent noted that he has himself become a review appraiser, identifying fraud cases for the District of Columbia and Baltimore, Maryland. He acknowledged that entries on the appraisal report for the subject Property are not consistent with how he now conducts his appraisals, but did not attempt to make excuses for his errors. Respondent confirmed that he has continued to be licensed by DCRA as a real estate appraiser. I credit Respondent's testimony that he was a relatively new appraiser at the time of the appraisal that is the subject of this proceeding, that he has continued his educational endeavors and that he has become a respected member of the appraisal community. The Board presented no evidence that it had any subsequent referrals relating to any misconduct by Respondent.

Although Respondent raised a question as to whether it is his signature on the appraisal report, and professed a lack of any recollection of having conducted this appraisal, his refusal to make excuses for his conduct is an acceptance of responsibility for his actions, which is a mitigating factor to consider. I also consider the length of time between Fannie Mae's referral of its concern to the Board in December 2001 and the issuance of the Notice of Intent to Take Disciplinary Action, which was not served on Respondent until October 2005, and the possible prejudice to Respondent's ability to prepare a defense arising from this unexplained delay.

As noted above, D.C. Code, 2001 Ed. § 47-2853.17(c) provides for a range of options when a licensee permitted under the subchapter has been found to have committed "any of the acts described in subsection (a) of this section." Given that the Board failed to prove the first charge of willful misconduct, the substantial delay in bringing these charges, Respondent's candor about his inability to contest the faulty appraisal, and the undisputed evidence of his subsequent efforts to improve his appraisal skills, I do not find that a suspension or revocation of Respondent's real estate appraiser's license is warranted. Rather, a probationary period and a not inconsequential fine are appropriate.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, it is, this 27th day of March, 2007:

ORDERED, that Charge I for willfully making a false and misleading appraisal report in violation of D.C. Code, 2001 Ed. § 47-2853.17(a)(9); 17 DCMR § 2317.1, and the *Uniform Standards of Professional Appraisal Practice*, 2000 edition, is hereby **DISMISSED**; and it is further

ORDERED, that Respondent is fined a total of **FIVE THOUSAND DOLLARS (\$5,000)** (\$2,500 for each charge) for violating D.C. Code, 2001 Ed. § 47-2853.17(a)(19); 17 DCMR § 2317.1, and the *Uniform Standards of Professional Appraisal Practice*, 2000 edition, Standards Rule 1-1(b) (Charge II) and Standard Rule 1-4(b)(iii) (Charge III); in accordance with the attached instructions to be paid within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Code, 2001 Ed. §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ %, or **SEVENTY FIVE DOLLARS (\$75)** per month or portion thereof, starting 20 calendar days from the mailing date of this Order, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code, 2001 Ed. § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that Respondent is placed on **PROBATION** for a period of two years. As a condition of this probation, Respondent shall be required to attend no less than 10 hours per year of continuing education courses **in addition** to the requirements contained in 17 DCMR 2310, with documentation thereof submitted to the Board by December 31 of each year in accordance

with the requirements of 17 DCMR 2311. Failure to abide by the terms of this probation may result in summary suspension of Respondent's license; and it is further

ORDERED, that the appeal rights of any parties aggrieved by this Order are set forth below.

March 27, 2007

Beverly Sherman Nash

Beverly Sherman Nash
Administrative Law Judge